NO. 57057-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BRETT HALE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James Dixon, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES, AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to excuse a prospective juror via a valid, non-racially motivated peremptory challenge by the defense.

2a. Repeated prosecutorial misconduct in closing and rebuttal arguments deprived appellant Brett Hale of his due process right to a fair trial.

2b. Prosecutorial misconduct in rebuttal argument, suggesting Mr. Hale tailored his testimony, violated article I, section 22 of the Washington Constitution.

2c. Defense counsel was constitutionally ineffective for failing to make a timely objection to prosecutorial misconduct in closing and rebuttal arguments.

3. The trial court exceeded its statutory authority by imposing nine months of community custody for Mr. Hale's felony harassment conviction.

4. The trial court erroneously ordered Mr. Hale to pay discretionary supervision fees as a condition of community custody.

Issues Pertaining to Assignments of Error

1a. Citing GR 37, the trial court prohibited defense counsel from exercising a peremptory challenge against a prospective juror. Where defense counsel offered a valid race-neutral reason for the challenge and, objectively viewed, race cannot be considered a factor in exercise of the challenge, did the court err in refusing to excuse the juror?

1b. Consistent with the inviolate jury trial right guaranteed by article I, section 21 of the Washington Constitution, is the court's error in denying the defense's attempted use of a peremptory challenge a constitutional one, necessitating application of the constitutional harmless error standard and, thereby, reversal of Mr. Hale's convictions?

2a. Must Mr. Hale's convictions be reversed, where the prosecutor repeatedly referred to facts not in evidence in

closing and rebuttal arguments, undermining Mr. Hale's credibility and significantly prejudicing his defense?

2b. Must Mr. Hale's convictions likewise be reversed, where the prosecutor insinuated Mr. Hale tailored his testimony based on nothing more than his presence at trial, violating article I, section 22 of the Washington Constitution?

2c. Alternatively, must Mr. Hale's convictions be reversed, where his attorney was constitutionally ineffective for failing to make timely objections to the repeated prosecutorial misconduct in closing and rebuttal arguments?

3. Where community custody is not statutorily authorized for the crime of felony harassment, is remand necessary for the trial court to strike Mr. Hale's nine-month community custody term imposed for that conviction?

4. Is remand likewise necessary for the trial court to strike discretionary supervision fees from Mr. Hale's judgment and sentence?

B. STATEMENT OF THE CASE

1. **Substantive Evidence**

Brett Hale and Rebecca Rickett went to junior high together and reconnected as adults. RP 278-79. They dated for two to three years and, by September of 2021, had lived together for several months in Lacey, Washington. RP 278-79. Mr. Hale worked as a supervisor for a distribution company, routing trucks and goods, but was laid off six months prior because of the pandemic. RP 421-22. When Mr. Hale lost his job, he started using methamphetamine, but hid it from Ms. Rickett. RP 344-45, 421, 453.

Mr. Hale's dealer or "plug" was William Ufford, who Mr. Hale knew only by his street name, "Bam-Bam." RP 420, 424. On September 14, 2021, Mr. Hale got a call from Bam-Bam, who was distraught after having a fight with his girlfriend and needed a ride from Mr. Hale. RP 422-23. Mr. Hale agreed to help out Bam-Bam, explaining the relationship between dealer and buyer: "any opportunity you have to help out your

plug or your big homey, you take advantage of it, you know," because "it just limits the price of the narcotics that you're buying." RP 424-25.

Mr. Hale took Ms. Rickett's second vehicle, a Jeep Grand Cherokee, which he had permission to use because his own vehicle had low tire pressure. RP 283, 422-23. Mr. Hale brought Bam-Bam back to the house, where they consumed methamphetamine together. RP 422, 425. Mr. Hale used at least twice his normal amount that day, "trying to act cool" in front of Bam-Bam. RP 426.

Bam-Bam asked for Mr. Hale's help moving his belongings into a storage unit because his girlfriend was going to kick him out and throw away his stuff. RP 424. Mr. Hale lent Bam-Bam the Jeep in exchange for the methamphetamine Bam-Bam supplied him that day. RP 424. Bam-Bam also asked to borrow a safe Mr. Hale kept in the garage. RP 430, 433. Mr. Hale emptied the safe of the important documents he kept inside and loaned it to Bam-Bam. RP 430-31.

Bam-Bam used the Jeep for about an hour and a half, loading it up with items like his skateboard and duffle bag full of clothes, before returning to Mr. Hale's and Ms. Rickett's home. RP 427. Mr. Hale and Bam-Bam hung out for another several hours, listening to music and doing more methamphetamine. RP 434.

Ms. Rickett came home around 8:00 p.m. after having several drinks at a friend's house. RP 330-31, 434, 437. Ms. Rickett had never met Bam-Bam before and thought he looked "sketchy," making her uncomfortable. RP 282, 322. Mr. Hale also seemed unusually "[h]yper, sweaty," and "[a] little amped up." RP 286. Ms. Rickett admitted she was "pissed" about the situation and "wanted them out." RP 325.

Mr. Hale wanted to leave to avoid confrontation but had lost track of his wallet and the Jeep keys. RP 457-58. In his altered state, he blamed Ms. Rickett and started questioning her repeatedly about them. RP 437. Things quickly escalated, with both Ms. Rickett and Mr. Hale becoming angry. RP 286-87,

437. Ms. Rickett eventually threatened to call the police if Mr. Hale and Bam-Bam did not leave. RP 287.

Feeling "at the end of [her] rope," Ms. Rickett called 911. RP 324. Sometime before or during the 911 call, Mr. Hale "kept repeating things like, 'Do you know what I'm capable of? I'm crazy.'" RP 288, 476. Later that night, Ms. Rickett told police that Mr. Hale also said, "'Do you want to die,' and then a swear word." RP 290. Ms. Rickett can be heard on the 911 call repeating, "he's trying to kill me." Ex. 1 (11:55). However, Ms. Rickett explained later, "[m]aybe it wasn't the best words to say" and "was blown out of context." RP 333-34. She testified Mr. Hale never clearly threatened her that night and she was never in fear for her life. RP 334, 336.

Police responded and approached the house on foot. RP 186. They saw two men walking back and forth to a Jeep in the driveway. RP 187. Mr. Hale heard Bam-Bam say, "Run," and saw two men dressed in black, looking "highly suspicious." RP 435-36. In his paranoid state, Mr. Hale did not recognize the

men to be police officers. RP 435-36. Mr. Hale and Bam-Bam ran inside the garage and closed the garage door. RP 189, 435.

Ms. Rickett exited the house via the back porch, still on the phone with 911. RP 190-91. Mr. Hale and Bam-Bam, however, did not come outside. RP 192. Police eventually got authorization to enter the house using an "explosive breach." RP 386. Police then took Mr. Hale and Bam-Bam, who had an outstanding warrant, into custody without further incident. RP 247-49. Mr. Hale explained he had taken a shot of vodka and passed out, sick with a sinus infection, finally waking up when he heard the loud boom. RP 440, 484.

Police searched the house and the Jeep. RP 193, 214. Inside the house, police found the door jamb for Ms. Rickett's bedroom broken from Mr. Hale forcing open the door. RP 201, 448. Downstairs in a spare room was a bolt-action rifle. RP 196, 280. Mr. Hale had never seen the rifle before, though he knew Bam-Bam was "well protected." RP 451-52. The door from the garage into the house was cut in half and off its

hinges. RP 202. In the garage, police found 9mm bullets, a pistol magazine, methamphetamine paraphernalia, and a scale with residue on it. RP 202-11. Mr. Hale admitted the scale was his, which he used to make sure he was not getting ripped off when buying drugs. RP 454.

Inside the Jeep on the dashboard, police found two boxes of 20-guage shotgun shells. RP 215. Also on the dash was a black zippered pouch with methamphetamine and heroin inside. RP 215, 375. Mr. Hale believed the pouch to be Bam-Bam's carrying case for his personal-use narcotics. RP 452. Inside the center console, police found Mr. Hale's wallet, along with the keys to the safe and the Jeep, underneath a pistol magazine and a scale with possible heroin residue. RP 216, 220, 570.

On the back seat, police found the safe, with just over a pound of methamphetamine, baggies, $3,960 in cash, several pistol magazines, and a stolen .45 caliber pistol inside. RP 215-16, 221-22, 231, 271-73. Though the safe belonged to Mr. Hale, the contents were not his. RP 439. In the trunk of the

Jeep was a 20-gauge shotgun, along with Bam-Bam's clothes and skateboard. RP 216, 428, 450. Mr. Hale had never seen the shotgun before. RP 450.

2. **Charges, Trial, and Sentencing**

The prosecution charged Mr. Hale by amended information with felony harassment – domestic violence (Count 1), third degree malicious mischief (Count 2), unlawful possession of methamphetamine with intent to deliver while armed with a firearm (Count 3), three counts of second degree unlawful possession of a firearm (Counts 4, 5, and 7), and possession of a stolen firearm (Count 6). CP 21-22.

Mr. Hale proceeded to a jury trial. RP 40. The parties stipulated Mr. Hale was previously convicted of a felony offense and was therefore prohibited from possessing a firearm. CP 83; RP 233. Mr. Hale's defense was the guns and narcotics belonged to Bam-Bam, and that he never threatened to kill Ms. Rickett, nor did Ms. Rickett ever fear he might kill her. RP 446-53, 593-94, 603.

During jury selection, defense counsel attempted to exercise a peremptory challenge against Prospective Juror 1. RP 136. The prosecution objected under GR 37 because Juror 1 appeared to be a person of color. RP 136.

Defense counsel responded "[t]he problem with juror number one, as he stated, is that he is going to be impacted by his work, working for the government in CPS, DSHS, that sort of thing, and our concern is precisely what he said which is that he's not going to be able to leave behind his -- his history, his work history in dealing with the issues in this case." RP 136. Counsel noted he was also using a peremptory strike against Juror 9, who had similar work experience "in social work dealing with people and their problems and their drug issues, their domestic violence issues[.]" RP 139.

The trial court found Juror 1 "appears to be nonwhite," perhaps Latino or of Hispanic origin. RP 138-39, 146. The parties identified three other jurors who also appeared to be persons of color—Jurors 11, 12, and 21—all of whom defense

counsel was not seeking to strike from the panel. RP 141. The court found, in its 20 years of working with defense counsel, he had no history of using peremptories "disproportionally against a given race or ethnicity." RP 144. The court further acknowledged counsel "has an articulable reason to exercise a peremptory challenge on behalf of his client." RP 147-48.

The court nevertheless denied the peremptory challenge, concluding, "from an objective perspective an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." RP 147. The court did not address any of the considerations specified in GR 37(g) and did not compare Juror 1's answers to any other jurors, including Juror 9. See RP 147-48. When defense counsel reiterated his objection, the court noted its interpretation of GR 37 "is that the court is not required to do a balancing of all of the factors contained within the rule." RP 154.

Juror 1 sat on Mr. Hale's jury, along with Jurors 11, 12, and 21 (who became Jurors 1, 4, 5, and 7, respectively). CP

165-66; RP 150, 586. The jury acquitted Mr. Hale of possession of a stolen firearm (Count 6), but convicted Mr. Hale as charged on all other counts. CP 100-12.

At sentencing, Mr. Hale explained everything fell apart when he lost his job and his methamphetamine addiction consumed him. RP 642. He admitted his "absurd behavior was extremely dangerous and totally out of [his] character." RP 642. He apologized to Ms. Rickett, as well as his attorney, the prosecutor, and the trial judge. RP 642-43.

The trial court took Mr. Hale's apology to be sincere and "heartfelt." RP 643. However, the court had little discretion to impose anything but the statutory maximum of 120 months on the drug conviction, due to Mr. Hale's offender score of 9+ and the mandatory 36-month firearm enhancement. RP 645; CP 125-27. Mr. Hale timely appealed. CP 113.

C. ARGUMENT

1. **The trial court erroneously prohibited the defense from using a peremptory challenge to excuse Juror 1, necessitating reversal of Mr. Hale's convictions.**

The trial court erred in refusing to permit Mr. Hale to excuse Juror 1 via peremptory challenge. An objective observer would not consider race a factor in the exercise of the peremptory. The trial court failed to recognize it was Juror 1's relevant work experience with CPS and domestic violence that distinguished him from other jurors, not his apparent race or ethnicity. Where the error was prejudicial under both the constitutional and nonconstitutional harmless error standards, reversal is required.

a. *The trial court misapplied GR 37 in prohibiting Mr. Hale from exercising a peremptory strike against Juror 1.*

A trial court's decision on a GR 37 objection is reviewed de novo where there is no issue of credibility. State v. Tesfasilasye, 200 Wn.2d 345, 355-56, 518 P.3d 193 (2022).

There are several steps to evaluating a GR 37 objection. First, the party making the objection must establish a prima facie case that the challenged juror is a "member of a 'cognizable racial group.'" State v. Booth, 22 Wn. App. 2d 565, 572, 510 P.3d 1025 (2022) (quoting City of Seattle v. Erickson, 188 Wn.2d 721, 732, 398 P.3d 1124 (2017)). Courts presume a "discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury." Erickson, 188 Wn.2d at 734.

Second, the burden shifts to the party exercising the peremptory challenge to provide a race-neutral justification. GR 37(d); Booth, 22 Wn. App. 2d at 572.

And, third, the reviewing court applies the standard from GR 37(e) to determine whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." Booth, 22 Wn. App. 2d at 572. An "objective observer" is one who is "aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have

resulted in the unfair exclusion of potential jurors in Washington State." GR 37(f).

Under the "objective observer" standard, reviewing courts rationally "evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances." GR 37(e); Booth, 22 Wn. App. 2d at 572. Courts must pay "particular attention" to the circumstances identified in GR 37(g):

> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
>
> (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
>
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
>
> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and

> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

Booth, 22 Wn. App. 2d at 573. If, after considering the total circumstances objectively, "race 'could' have been 'a factor,' then the strike must be denied." Id. (quoting State v. Jefferson, 192 Wn.2d 225, 230, 429 P.3d 467 (2018); GR 37(e)).

Although GR 37 is relatively new, case law provides some useful contrasts. In State v. Omar, 12 Wn. App. 2d 747, 754-55, 460 P.3d 225 (2020), for instance, the trial court properly denied a defense peremptory strike of Juror 16, who appeared to be of Asian descent. At Omar's trial for robbery, Juror 16 explained she worked at a bank when it was robbed and was unsure whether that experience would affect her ability to be fair. Id. at 748. Defense counsel did not ask any follow-up questions. Id. Then, in attempting to strike Juror 16, defense counsel said only that he "didn't like some of [her] responses," and he "would feel uncomfortable having her on the jury." Id. at 749.

The court of appeals held these "nebulous" explanations "fail[ed] to identify specific problems with [the juror's] responses." Id. at 754. The court emphasized both GR 37 and the Washington Supreme Court "discourage acceptance of such vague and unsubstantiated reasons on the basis that they might mask conscious or unconscious bias." Id. Under the circumstances, "an objective observer could view race as a factor in the challenge." Id. at 755.

Conversely, in Booth, the trial court erred in refusing to allow the defense to strike Juror 6, who was of East Asian descent. 22 Wn. App. 2d at 575, 580. At Booth's DUI trial, Juror 6 revealed discomfort with drinking and driving, including his desire for a zero-tolerance law. Id. at 578. Defense counsel explained this was the reason for the peremptory challenge—Juror 6 "seems to harbor certain positions that [counsel] found to be potentially inconsistent with being able to decide and balance the issues we have before the court." Id. at 575-76. Counsel also

used peremptory challenges to remove two other jurors who gave similar answers. Id.

The court of appeals concluded, "[u]nlike Omar, defense counsel here articulated specific reasons to challenge juror 6, and those reasons were supported by the record." Id. at 579. The court therefore held, "the totality of the circumstances, including the considerations under GR 37(g), would not lead an objective observer to conclude race could have been a factor in defense counsel's decision to exercise a peremptory challenge on juror 6." Id. at 580.

Mr. Hale's case is analogous to Booth rather than Omar. The trial court found Juror 1 to be "not white," perhaps Latinx or of Hispanic origin, though the court noted "I'm not certain . . . what his ethnic background is." RP 138-39, 146-47. Defense counsel did not object to this finding, so Mr. Hale assumes for the sake of argument that the prosecution established a prima facie case that Juror 1 is a member of a cognizable racial or ethnic group.

However, the record is insufficient to conclude Juror 1 was the sole member of a particular racial or ethnic group. The court found Juror 1 "may, in this court's opinion, be the only person in this jury panel who has a particular skin tone." RP 147. But Juror 11 was also identified as possibly being a person of color, and she has a Hispanic surname.[1] RP 141-42; CP 165 (listing Juror 11's name). In Lahman, the court of appeals found the challenged juror's Asian surname "enough to raise the concern that an objective observer could perceive Juror 2 as a racial or ethnic minority." State v. Lahman, 17 Wn. App. 2d 925, 935, 488 P.3d 881 (2021). Therefore, this Court should not presume a discriminatory purpose behind defense counsel's strike.

The burden then shifted to defense counsel to "articulate the reasons the peremptory challenge has been exercised." GR 37(d). Like in Booth, defense counsel provided specific

[1] See State v. Listoe, 15 Wn. App. 2d 308, 332 & nn.16-18, 475 P.3d 534 (2020) (Melnick, J., concurring) (emphasizing the difficulty of identifying an individual's race or ethnicity based on visual observation alone).

reasons for challenging Juror 1 and those reasons are supported by the record. GR 37(g)(i); RP 136, 139.

Juror 1 indicated on his questionnaire and during voir dire that he is a social worker. RP 139. The prosecution asked of the panel, "Does anyone have any specialized training, education or experience in the subject of physical altercations committed by household member members or dating partners?" RP 108. Juror 1 volunteered, "I work for – I'm a consultant for Child Protective Services. So we do -- part of our training is domestic violence training and substance harm reduction and associated training." RP 108. When the prosecution asked if Juror 1, in light of his "life experience," could "assess the evidence in this case fairly and impartially," he responded, "I do believe so." RP 109.

Juror 1 reiterated his relevant work experience on defense counsel's turn. RP 127. For instance, defense counsel asked the group, "Is there anybody that has this general perception that prosecutors do not take weak cases to trial?" RP 126. Juror 1 expressed his view that prosecutor's offices "have limited

resources, and so based on my experience as a CPS social worker and consultant that I have seen situations where some cases may not go to trial because of a lack of evidence or not being as strong of a case." RP 127. Defense counsel did not follow up with Juror 1 about this particular answer, but posed another question to the group, "is there any reason why any of you feels that you cannot be a fair and impartial juror in this case?" RP 128. Juror 1 again volunteered,

> I think based on my professional experience I have seen how substance use, criminal activity and so forth can impact the families that we serve so there is that (indiscernible), but I would do everything I could to be a fair and impartial juror, but I do have professional experience.

RP 129-30. This time, unlike Omar, defense counsel followed up with Juror 1, asking if he would "be pulled or emotionally impacted" by his work experience. RP 130. Juror 1 answered:

> I do not think I'll be emotionally impacted, but however, my professional experience, I do have some, you know, experience at a professional level in dealing with families who are dealing with adverse circumstances. So I have, you know, (indiscernible) too much training in some ways and

> just (indiscernible) professional experience from what I do that would be in the back of my mind.

RP 130. Defense counsel gave these responses as the basis for the peremptory challenge, explaining Juror 1 worked "for the government in CPS" and stated "he's not going to be able to leave behind his -- his history, his work history in dealing with the issues in this case." RP 136, 139.

In Booth, defense counsel was rationally concerned about the challenged juror bringing his zero tolerance views on drinking and driving into the case. 22 Wn. App. 2d at 579-80. Here, too, counsel was rationally concerned about Juror 1 bringing his specialized experience into deliberations, particularly where the prosecution alleged domestic violence on the harassment charge. CP 21, 95. Juror 1 reiterated his work experience three separate times during voir dire and stressed "that would be in the back of my mind" in evaluating the case. RP 108, 127, 129-30. Attorneys are expected, even required, to use their peremptory challenges to remove jurors with specialized experience material

to the case. See, e.g., Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 269, 796 P.2d 737 (1990) (finding no juror misconduct in deliberations because juror "fully disclosed" her relevant medical background during voir dire and defense counsel "did not remove her from the jury"); Grotemeyer v. Hickman, 393 F.3d 871, 878 (9th Cir. 2004) ("Counsel ordinarily learn during voir dire what a veniremember does for a living, and use peremptory challenges to avoid jurors whose experience would give them excessive influence.").

Furthermore, defense counsel explained he was also using a peremptory challenge against Juror 9, who did not appear to be a person of color, for the same reason as Juror 1. GR 37(g)(ii), (iii); RP 139; CP 165 (counsel striking Juror 9 as his first peremptory). Like Juror 1, Juror 9 indicated during voir dire that, for the last 30 years, she "worked with CPS, CWS and the community services office." RP 111, 139. Juror 9 stated she would try her best to set that experience aside, explaining, "I can't say no, but I can't say yes." RP 111. Defense counsel

followed up with Juror 9. RP 131. Juror 9 expressed frustration about "people coming into the office every day high, getting high, dieing [sic] in our restrooms, selling drugs in our parking lot." RP 131. Like Juror 1, defense counsel asked Juror 9 about her ability to be fair and impartial. RP 131-32. And, like Juror 1, she expressed some reservations, explaining she could "try," but it made her "angry to see it every day," and she "can't guarantee that it won't be there." RP 132.

Admittedly, defense counsel asked a few more questions of Juror 9 than Juror 1, perhaps because Juror 9's answers were terser than Juror 1's. See RP 131-32. But the goal was the same: to discern whether Juror 9 would bring her relevant work experience to bear in evaluating the prosecution's case. And, like Juror 1, when she indicated she might, defense counsel used a peremptory challenge to strike her from the jury. CP 165. This, again, is analogous to Booth, where counsel struck jurors who gave similar answers about zero tolerance for drinking and driving. 22 Wn. App. 2d at 579. On balance, then, GR 37(g)

factors (i), (ii), and (iii) all cut against the trial court's conclusion that an objective observer could view race or ethnicity as a factor in the defense strike of Juror 1.

As for factor (iv), employment with a government entity is not a reason that "might be disproportionately associated with a race or ethnicity." GR 37(g)(iv). By comparison, the Lahman court held the prosecution's peremptory strike of Juror 2 was properly denied where the prosecution's "focus on Juror 2's youth and lack of life experiences played into at least some improper stereotypes about Asian Americans, particularly given the lack of any record about the relative ages of other jurors." 17 Wn. App. 2d at 937-38.

And, finally, the court found defense counsel had no history whatsoever of using peremptory challenges "disproportionately against a given race or ethnicity." GR 37(g)(v); RP 144. Indeed, in this case, defense counsel did not attempt to strike several other jurors of color, including Juror

11 who was also potentially of Hispanic origin. RP 153-54; CP 165 (Jurors 11, 12, and 21 seated on Mr. Hale's jury).

The trial court seems to have assumed the "objective observer" standard was met based solely because Juror 1 appeared to be a person of color. See RP 147-48, 154. The court did not consider any of the GR 37(g) factors except the final one, finding no history of discriminatory strikes by defense counsel. RP 144, 147-48. De novo evaluation of the GR 37(g) factors makes the trial court's mistake readily apparent. The totality of the circumstances would not lead an objective observer to conclude race could have been a factor in defense counsel's decision to strike Juror 1. This Court should hold the trial court erred in denying counsel's peremptory challenge of Juror 1.

b. *Given the allegations against Mr. Hale, there is a reasonable probability Juror 1's presence on the jury materially affected the outcome of Mr. Hale's trial.*

In Booth, Division One held the nonconstitutional harmless error standard applies to the trial court's erroneous

denial of a peremptory challenge. 22 Wn. App. 2d at 584. "Under this standard, an 'error is not prejudicial unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" Id. (quoting State v. Aljaffar, 198 Wn. App. 75, 86, 392 P.3d 1070 (2017)). The petitioner in Booth made no attempt to explain how the challenged juror's presence on the jury made a difference, so Booth is of little utility here. Id.

There is a reasonable probability Juror 1's presence on the jury made a difference in the outcome of Mr. Hale's trial. Juror 1 repeatedly noted his expertise as a CPS consultant with domestic violence and families impacted by substance abuse. RP 108-09, 127-30. He admitted he had "too much training in some ways" and his professional experience "would be in the back of [his] mind" in assessing whether the prosecution met its burden. RP 130. Washington courts recognize expertise in the dynamics of domestic violence relationships can inform the jury's evaluation of the evidence, especially when the complaining witness recants

or gives inconsistent accounts. See, e.g., State v. Case, 13 Wn. App. 2d 657, 678-79, 466 P.3d 799 (2020) ("Expert witnesses may testify on general characteristics or conduct typically exhibited by survivors of domestic violence."); State v. Grant, 83 Wn. App. 98, 109, 920 P.2d 609 (1996) (holding expert testimony would be properly admitted to show "that the consequences of domestic violence often lead to seemingly inconsistent conduct on the part of the victim").

Juror 1's expertise was therefore particularly relevant, and harmful, where the prosecution alleged Mr. Hale threatened to kill Ms. Rickett, his girlfriend. At trial, Ms. Rickett backtracked on statements she made the night of the incident, testifying instead that Mr. Hale never actually threatened to kill her and she never felt afraid for her life—both essential elements of felony harassment. RP 333-36; CP 65. Against the backdrop of these inconsistent statements, evidence was introduced that Mr. Hale and Ms. Rickett had been in a prior physical altercation where Mr. Hale choked Ms. Rickett. RP 334-35, 348. Ms. Rickett's

credibility was relevant to the other charges, as well, where she testified many of the items found in the Jeep did not belong to Mr. Hale, like the clothes and skateboard, which supported Mr. Hale's defense that the guns and narcotics belonged to Mr. Ufford. RP 341-46.

Jurors are expected to bring their experiences and insights into deliberations. State v. Briggs, 55 Wn. App. 44, 58, 776 P.2d 1347 (1989). Given that Juror 1 admitted his expertise in domestic violence relationships and substance abuse would inform his evaluation of the case, this Court can be assured that it did. RP 130. His presence on the jury put a proverbial thumb on the prosecution's scale; in other words, the prosecution had the benefit of an untested expert not subject to cross-examination. Under the particular circumstances of this case, the prejudice standard is met, and so this Court should reverse Mr. Hale's convictions and remand for a new trial.

c. *Alternatively, our more protective jury trial right under article I, section 21 necessitates application of the constitutional harmless error standard.*

If this Court determines Mr. Hale cannot demonstrate prejudice under the nonconstitutional harmless error standard, then this Court should consider whether wrongful denial of an attempted peremptory challenge is constitutional error under article I, section 21 of the Washington Constitution. Because peremptory challenges were guaranteed by law when our constitution was adopted in 1889, and Washington courts recognize wrongful denial of an attempted peremptory challenge is "significant error," this Court subject the error to constitutional harmless error analysis. Under that standard, the prosecution cannot demonstrate the error was harmless beyond a reasonable doubt and so reversal is necessary.

i. No cases control on this issue.

Division One's decision in Booth is not controlling on this question, for two reasons. First, this Court is not bound by the

decisions of other divisions. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 147, 410 P.3d 1133 (2018). Second, the petitioner in Booth did not conduct a Gunwall[2] analysis, instead simply arguing State v. Vreen, 143 Wn.2d 923, 26 P.3d 236 (2001), controlled and so the error in denying the defense's peremptory challenge was structural. Booth, 22 Wn. App. 2d at 582. The Booth court therefore did not have occasion to decide whether article I, section 21 provides greater protection than our federal constitution in this context. See id.; Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.").

Similar to Mr. Hale's case, the trial court in Vreen erroneously refused to allow the defense to exercise a peremptory challenge, citing Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Vreen, 143 Wn.2d at 925-26.

[2] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

Relying on federal circuit court cases, without any mention of article I, section 21, the Vreen court held erroneous denial of a litigant's peremptory challenge is structural error when the objectionable juror actually deliberates. Id. at 929-32.

Many years later, the Washington Supreme Court limited the holding of Vreen in In re Personal Restraint of Meredith, 191 Wn.2d 300, 422 P.3d 458 (2018). There, the trial court erroneously gave both parties one less peremptory challenge than they were entitled to under the criminal rules. Id. at 303. Neither party objected. Id. At issue in Meredith's petition was whether his appellate counsel was ineffective for failing to raise the peremptory challenge issue on direct appeal. Id.

Meredith conceded "there is 'no constitutional right to peremptory challenges,'" without conducting a Gunwall analysis, and so the court did not examine article I, section 21. Meredith, 191 Wn.2d at 309 (quoting State v. Kender, 21 Wn. App. 622, 626, 587 P.2d 551 (1978)). Meredith nevertheless argued Vreen dictated automatic reversal. Id. at 310.

The Meredith court disagreed, distinguishing Vreen and holding it was "more limited" than its broad language suggested. Meredith, 191 Wn.2d at 310. The court explained, "in Vreen, the error was preserved for appeal and also was constitutional because it involved a Batson challenge." Id. The court recognized "[w]rongly denying an attempted use of a peremptory challenge where the objectionable juror then sits on the jury that convicts the defendant is a more significant error than allowing one less peremptory challenge than the court rules provide." Id.

The Meredith court also noted Rivera v. Illinois, 556 U.S. 148, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009), abrogated the federal cases on which the Vreen court relied. Meredith, 191 Wn.2d at 311. In Rivera, the United States Supreme Court held, because peremptory challenges are not of federal constitutional dimension, "the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution." 556 U.S. at 158. The Rivera Court left it to the states to decide whether, as a matter of state law, "a trial court's

mistaken denial of a peremptory challenge is reversible error *per se*." Id. at 162. The Meredith court expressly declined to decide this issue, instead holding only that structural error did not extend to a miscount of peremptory challenges. 191 Wn.2d at 312.

The Washington Supreme Court even more recently recognized the right to exercise peremptory challenges is "nonconstitutional." State v. Lupastean, 200 Wn.2d 26, 31, 513 P.3d 781 (2022). The issue in Lupastean was what harmless error standard applies when a juror fails to disclose material information during voir dire and that undisclosed information might have triggered a peremptory challenge. Id. The Lupastean court held "juror nondisclosure must be treated similarly to other nonconstitutional errors that require a new trial only on an affirmative showing of prejudice." Id. But, like in Meredith, the court did not analyze article I, section 21, nor did it address the wrongful denial of an attempted peremptory challenge.

While our state supreme court has broadly pronounced peremptory challenges are nonconstitutional in nature, the court

has not decided the specific issue presented here. Therefore, neither Meredith nor Lupastean control:

> "Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court."

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (quoting ETCO, Inc. v. Dep't of Labor & Indus., 66 Wn. App. 302, 307, 831 P.2d 1133 (1992)).

ii. The structure and unique text of our state constitution support independent interpretation.

The six nonexclusive factors set out in Gunwall support the conclusion that, under article I, section 21, wrongful denial of an attempted peremptory challenge is constitutional error, subject to the constitutional harmless error standard. These factors are: (1) the text of the state constitutional provision, (2) differences in the parallel state and federal provisions, (3) state constitutional history, (4) preexisting state law, (5) structural differences

between the two constitutions, and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

The first and second Gunwall factors weigh in favor of concluding article I, section 21 is more protective than the federal constitution in this context. Both article I, section 22 and the Sixth Amendment guarantee the right to trial "by an impartial jury," and so they are usually interpreted coextensively. State v. Munzanreder, 199 Wn. App. 162, 174, 398 P.3d 1160 (2017).

However, article I, section 21 of our state constitution, adopted in 1889, additionally mandates the "right of trial by jury shall remain inviolate." This provision has "no federal counterpart." State v. Brown, 132 Wn.2d 529, 595, 940 P.2d 546 (1997). "The term 'inviolate' connotes deserving of the highest protection." Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). "For [the jury trial] right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees." Id.; see also State v. Morales, 196 Wn. App. 106, 112, 383 P.3d 539 (2016) ("The jury

trial right may not be impaired by either legislative or judicial action."). The uniqueness of article I, section 21 lends support for independent interpretation, as well as limited application of Meredith and Lupastean, neither of which interpreted article I, section 21 in this context. See City of Pasco v. Mace, 98 Wn.2d 87, 96, 653 P.2d 618 (1982).

The fifth factor, differences in structure between the state and federal constitutions, "'will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power.'" State v. Bassett, 192 Wn.2d 67, 82, 428 P.3d 343 (2018) (quoting State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994)). Similarly, the sixth factor weighs in favor of independent interpretation, because there is no need for national uniformity in jury selection. As the Rivera Court held, it is up to the states to decide the harmless error standard that applies when a litigant is wrongfully denied use of a peremptory challenge. 556 U.S. at 162.

iii. State constitutional history and preexisting state law strongly support application of the constitutional harmless error standard.

"[I]n order to determine the scope of the jury trial right under the Washington Constitution, it must be analyzed in light of the Washington law that existed at the time of the adoption of our constitution." State v. Smith, 150 Wn.2d 135, 153, 75 P.3d 934 (2003). This is because article I, section 21 "preserves the right as it existed at common law in the territory at the time of its adoption." Mace, 98 Wn.2d at 96.

In Mace, for instance, the Washington Supreme Court held our state jury trial right extended to every criminal case, including misdemeanors. Id. at 101. When the state constitution was adopted in 1889, the code of 1881 was in effect and provided a right to jury trials for misdemeanors and municipal violations. Id. at 98-100. Given this "treasured" right, the constitution preserved the right to jury trials for misdemeanors. Id. at 99; see also Brown, 132 Wn.2d at 597 (upholding death qualification

process for juries in capital cases, where the law in effect when the constitution was adopted (Code of 1881 § 1083) allowed for the very same process).

By contrast, in Smith, the court held article I, section 21 did not guarantee the right to have juries determine prior convictions at sentencing. 150 Wn.2d at 156. The court acknowledged our state constitution "generally offers broader protection of the jury trial right than does the federal constitution," but "a historical analysis of Washington law at the time of the adoption of our state constitution indicates that juries did not then determine sentences." Id.

Just like the jury trial right at issue in Mace, peremptory challenges were guaranteed in both civil and criminal cases when our state constitution was adopted. Code of 1881 §§ 207, 208, 1079.[3] Indeed, they were provided for in the first statutes passed in 1854 when Washington was a territory. Laws of 1854, p. 118 § 102; p. 165 § 186.15. Subsequent territorial laws reaffirmed

[3] Copies of these are attached as an appendix.

Washington's commitment to providing peremptory challenges. Laws of 1877, p. 43, §§ 211-212; Laws of 1873, p. 236 § 240; Laws of 1869, p. 51 § 212.16. Given this history, the right to exercise a peremptory challenge for a valid reason is preserved under our state constitution as part of the inviolate jury trial right.

The United States Supreme Court has held peremptory challenges are not mandated under the federal constitution. United States v. Martinez-Salazar, 528 U.S. 304, 311, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). This interpretation makes sense because legislation authorizing peremptory challenges in federal cases was enacted in 1790, a year after the federal constitution was ratified. Id. at 311-12. By contrast, peremptory challenges were provided for by law when Washington adopted its constitution. Thus, a different result is warranted. See Mace, 98 Wn.2d 97-98 (noting, when the federal constitution was adopted, "there was no statute to guide the [United States Supreme Court] in determining what offenses were triable by jury at that time").

Furthermore, although Vreen no longer controls, it provides additional support for the conclusion that the erroneous denial of an attempted peremptory challenge is more significant than nonconstitutional error. In State v. Martin, 171 Wn.2d 521, 533, 252 P.3d 872 (2011), the court conducted a Gunwall analysis to determine whether a prosecutor's cross-examination about whether the defendant tailored his testimony to conform to the evidence violated article I, section 22. Applying the fourth Gunwall factor, preexisting state law, the court recognized "it is significant that some Washington courts have held that the State violates the Sixth Amendment by implying that a defendant tailored his or her testimony." Martin, 171 Wn.2d at 532. While not dipositive, this "does signal that Washington courts have on occasion favorably viewed the argument." Id. The same is true of Vreen and other cases holding the same. See Meredith, 191 Wn.2d at 310-11 (discussing cases).

As recently as Meredith, the Washington Supreme Court recognized an error like the one in Vreen (and in Mr. Hale's case)

is "more significant" than "allowing one less peremptory challenge than the court rules provide." 191 Wn.2d at 311. The Meredith court even characterized the error in Vreen as a "constitutional" one because it involved a Batson challenge. Id. at 310. Lupastean did not disavow these distinctions. 200 Wn.2d at 52. Although GR 37 goes above and beyond Batson, courts hold the erroneous excusal of a juror protected by GR 37 to be constitutional error. See Booth, 22 Wn. App. 2d at 581. Meredith suggests the converse is also constitutional error. These authorities make clear the erroneous denial of an attempted peremptory challenge is qualitatively different—and more serious—than the loss of a peremptory challenge a litigant *might* have used, like in Meredith and Lupastean.

Our state constitutional history and preexisting state law therefore strongly support the conclusion that, under our more protective jury trial right, the wrongful denial of an attempted peremptory challenge is constitutional error where the objectionable juror deliberates, as Juror 1 did here. CP 165-66;

RP 586. Constitutional error is presumed prejudicial, and the prosecution bears the burden of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). The prosecution cannot make this showing, for the same reason that the court's refusal to excuse Juror 1 was prejudicial under the nonconstitutional standard. See supra argument 1.b. This Court should reverse Mr. Hale's convictions and remand for a new trial.

2. **Repeated prosecutorial misconduct in closing and rebuttal arguments deprived Mr. Hale of his due process right to a fair trial.**

Four times in closing and rebuttal arguments the prosecutor claimed Mr. Hale conspired with his roommate to "come up with some ideas" about his testimony, contrary to Mr. Hale's testimony that he recalled no such conversation. The prosecutor further insinuated Mr. Hale tailored his testimony based on nothing more than his presence at trial. The prosecutor also claimed Ms. Rickett picked out Mr. Hale's trial clothes based on no evidence at all. These repeated improper references

to facts not in evidence accumulated to undermine Mr. Hale's credibility—the cornerstone of his defense. Under the circumstances, reversal is necessary.

a. *The prosecution engaged in misconduct by repeatedly arguing facts not in evidence.*

"Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial." State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Prosecutors are officers of the court and, consequently, have a duty to ensure that an accused person receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). As quasi-judicial officers, prosecutors are obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). "[W]hile [they] may strike hard blows, [they are] not at liberty to strike foul ones." Berger, 295 U.S. at 88.

Consistent with these duties, prosecutors have "some latitude to argue facts and inferences from the evidence," but "are not permitted to make prejudicial statements unsupported by the record." State v. Jones, 144 Wn. App. 284, 293, 183 P.3d 307 (2008). It is therefore misconduct for a prosecutor to "suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); accord State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012) ("[A] prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.").

i. The prosecution claimed four times that Mr. Hale admitted to "coming up with some ideas" about his testimony, when Mr. Hale made no such admission.

On cross-examination, the prosecutor asked Mr. Hale whether he had the opportunity to review his discovery, which Mr. Hale confirmed. RP 481-82. The prosecutor continued:

> Q. Isn't it true that you spoke with someone and you told them that you have been reviewing the police reports with your roommate? Yes or no.
>
> A. I might have. I'm not quite sure.
>
> Q. And in that conversation the person you were speaking with you said that you and your roommate were coming up with some ideas.
>
> A. *I don't remember -- recall that at all, no*.

RP 482 (emphasis added). The prosecutor did not thereafter introduce any extrinsic evidence establishing the content of this alleged conversation or otherwise impeach Mr. Hale about his response. See State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999) ("If a witness does not testify at trial about the incident, whether from lack of memory or another reason, there is no testimony to impeach.").

Despite Mr. Hale's denial, the prosecutor referred to the alleged conversation no less than four times in closing and rebuttal arguments. First, in closing, the prosecutor claimed Mr. Hale "had talked on the phone to someone and described that he

and his roommate were reviewing the reports, and *he also testified that he told this person on the phone that as he and his roommate were reviewing the reports were coming up with some ideas*." RP 562 (emphasis added).

Defense counsel did not object, but responded to the prosecution's misrepresentation of the evidence in his own closing argument:

> [The prosecutor] tries to introduce as evidence this issue of Mr. Hale talking on the phone with somebody about coming up with a plan. That was in her question. What was his answer? I believe his answer was something along the lines of "I don't recall that." [The prosecutor] didn't play any phone calls for you. That is not in evidence, and you may not consider it as evidence, folks.

RP 602.

Instead of retracting the improper remark, however, the prosecutor dug in on rebuttal, referring to the alleged conversation a second time: "And when I asked Mr. Hale about making a statement that he and his roommate were going to come up with some ideas, *he again did not deny making that statement*.

He acknowledged that that was a statement that he had made." RP 607 (emphasis added). The prosecutor continued, referring to it a third time, "If Mr. Hale, as you're assessing his credibility, is telling you what he remembers happening on September 14th, *then why in the world were him and his roommate coming up with some ideas*?" RP 607 (emphasis added). And a fourth time shortly thereafter: "It's ironic that that's the testimony after he sat and listened to all of the other testimony, reviewed police reports and *talks with his roommate to come up with something, that that's what he came up with*." RP 608 (emphasis added).

The record makes plain Mr. Hale did not recall making the statement the prosecutor repeatedly claimed he made. RP 482. Case law holds, where a witness denies an accusation, the prosecutor's question is not evidence of that accusation. State v. Reeder, 46 Wn.2d 888, 285 P.2d 884 (1955), involved an analogous scenario. Reeder was charged with murdering his second wife. Id. at 888. In cross-examining Reeder, the prosecutor referred to a divorce complaint filed by Reeder's first

wife. Id. at 891. The prosecutor asked, "Now isn't it a fact . . . [t]hat she stated that the defendant has struck this plaintiff on numerous occasions, and threatened her with a gun." Id. Reeder denied the accusation. Id. Despite Reeder's denial, the prosecutor referred to Reeder threatening his first wife with a gun three times in closing argument. Id. at 891-92.

The Reeder court explained, "There is not one word of testimony in the record that the defendant threatened his first wife with a gun. The only testimony concerning that question is that he did not do so." Id. at 892. Given that the prosecutor repeated the argument three times in closing, the court refused to find "these misstatements of fact were made inadvertently." Id. The court acknowledged attorneys, "in the heat of a trial, are apt to become a little over-enthusiastic in their remembrance of the testimony," but emphasized, "they have no right to mislead the jury"—especially prosecutors. Id. The court reversed Reeder's conviction even though defense counsel had not objected to the misstatements, because "the harm had already been done, and it

could not have been cured by instructions to disregard the statements so flagrantly made." Id. at 893.

Reeder makes clear there was no evidence Mr. Hale admitted he and his roommate "were coming up with some ideas" about his trial testimony. Just like in Reeder, the only testimony was that Mr. Hale did not recall any such thing. RP 482. It was therefore misconduct for the prosecutor to argue in closing and rebuttal that Mr. Hale admitted to "coming up with some ideas." And, similar to Reeder, the prosecutor repeated the misstatements of fact four different times, indicating they were made deliberately. See also Girts v. Yanai, 501 F.3d 743 (6th Cir. 2007) ("'[R]epeated comments [] demonstrate that the errors were not inadvertent' because 'clearly, we are not dealing with a spontaneous comment that could be regretted but not retracted.'" (alteration in original) (quoting United States v. Smith, 962 F.2d 923, 935 (9th Cir. 1992)). As the Reeder court held, the prosecutor had no right to mislead the jury in this way.

ii. The prosecution made a general tailoring argument, prohibited by article I, section 22 of our state constitution.

The prosecution's fourth mention of Mr. Hale "coming up with some ideas" was problematic for an additional reason. RP 608. To reiterate, the prosecution claimed, "It's ironic that that's the testimony after he sat and listened to all of the other testimony, reviewed police reports and talks with his roommate to come up with something, that that's what he came up with." RP 608. Stripping away the unsupported portion of the prosecution's argument leaves only the claim that Mr. Hale tailored his testimony "after he sat and listened to all of the other testimony." RP 608. This amounts to a claim of general tailoring, which is prohibited under article I, section 22 of our state constitution.

Article I, section 22 guarantees the accused rights "to appear and defend in person" and "to testify in his own behalf." In Martin, the Washington Supreme Court considered whether

these protections "prohibit a prosecutor from indicating, via questioning, that a defendant has tailored his or her testimony to align with witness statements, police reports, and testimony from other witnesses at trial." 171 Wn.2d at 533.

A majority of the United States Supreme Court held in Portuondo v. Agard, 529 U.S. 61, 73, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000), that a defendant's Sixth Amendment rights are not violated when the prosecutor calls attention, during closing argument, to the fact that the defendant had the opportunity to hear all the witnesses testify and tailor his testimony accordingly. But, after conducting a Gunwall analysis, the Martin court concluded article I, section 22 is more protective than the Sixth Amendment in this context. Martin, 171 Wn.2d at 533-36. The Martin court therefore rejected the majority opinion in Portuondo, instead adopting Justice Ginsburg's dissenting view that the majority went too far. Id. at 535-36.

Justice Ginsburg criticized the majority for "transform[ing] a defendant's presence at trial from a Sixth Amendment right into

an automatic burden on his credibility." Portuondo, 529 U.S. at 76 (Ginsburg, J., dissenting). She reasoned a defendant confronted with tailoring on cross-examination "might display signals of untrustworthiness that it is the province of the jury to detect and interpret." Id. at 79. "But," she emphasized, "when a generic argument is offered on summation, it cannot in the slightest degree distinguish the guilty from the innocent." Id. "In other words, Justice Ginsburg distinguished a comment in closing argument that is 'tied only to the defendant's presence in the courtroom and not to his actual testimony' from accusations made during cross-examination of the defendant," when the jury can evaluate whether the defendant exhibits untrustworthiness. Martin, 171 Wn.2d at 535-36 (quoting Portuondo, 529 U.S. at 77 (Ginsburg, J., dissenting)).

The Martin court therefore concluded questions about tailoring during cross-examination are compatible with article I, section 22 when the defendant has opened the door to them on direct-examination. Martin, 171 Wn.2d at 535-36. The court of

appeals has similarly held there to be no improper tailoring argument where a defendant's trial testimony differs substantially from statements given to law enforcement. See, e.g., State v. Teas, 10 Wn. App. 2d 111, 125, 447 P.3d 606 (2019); State v. Berube, 171 Wn. App. 103, 114-15, 286 P.3d 402 (2012).

By contrast, in State v. Wallin, 166 Wn. App. 364, 372, 269 P.3d 1072 (2012), the defendant did not open the door to cross-examination about tailoring because he did not testify he based any of his answers on what he learned from the evidence, like the defendant did in Martin. The prosecutor therefore violated the defendant's article I, section 22 rights where there was no showing he had "any opportunity to 'tailor' his testimony other than showing up for trial." Id. at 377. As the Berube court explained, "the evil addressed in Martin is a closing argument that burdens the exercise of constitutional rights without an evidentiary basis and in a fashion preventing the defendant from meaningful response." Berube, 171 Wn. App. at 116-17.

Here, the prosecutor's argument that Mr. Hale "came up with" his testimony "after he sat and listened to all of the other testimony" was based on nothing more than Mr. Hale's presence at trial. RP 608. Without the unsupported statement that Mr. Hale conspired with his roommate "to come up with something," the prosecutor had no evidentiary basis to assert Mr. Hale tailored his testimony. The prosecutor did not tie her claim of tailoring to any inconsistent statements Mr. Hale made to police, which could have indicated tailoring like in Teas and Berube. Nor did Mr. Hale open the door on direct-examination by stating he based his testimony on what he heard in court, like in Martin.

Instead, the prosecution lodged a generic tailoring claim for the first time in rebuttal argument, when Mr. Hale had no opportunity to refute the claim and the jury could not evaluate the trustworthiness of Mr. Hale's response. This is precisely the type of unconstitutional tailoring argument, made for the first time in summation, that Justice Ginsburg condemned in her Portuondo dissent. The prosecutor's claim in rebuttal that Mr. Hale "came

up with" his testimony "after he sat and listened to all of the other testimony" therefore violated article I, section 22.

iii. The prosecution claimed Ms. Rickett picked out Mr. Hale's trial clothes, based on no evidence in the record.

The prosecutor referred to facts not in evidence yet another time in closing argument. The prosecutor began by discussing why Ms. Rickett's trial testimony might be different than her 911 call. RP 552. The prosecutor argued, "She also told you that she still cares about the defendant. You heard that she has been still providing him with money. She writes letters. They still say 'I love you' to each other. *And in fact, she picked out the clothes that he's worn for the last week.*" RP 552 (emphasis added).

There was no evidence Ms. Rickett picked out Mr. Hale's trial clothes. Neither Ms. Rickett nor Mr. Hale, nor any other witness, testified as much. On direct-examination, Ms. Rickett agreed she still cares about Mr. Hale, even though they broke up because of the incident. RP 299. Mr. Rickett admitted on cross to the other statements the prosecutor made. RP 337. But, at no

point during any of this testimony did Ms. Rickett admit she picked out Mr. Hale's clothes for trial. Likewise, Mr. Hale acknowledged he still had a relationship with Ms. Rickett but did not go into any further detail. RP 446. The prosecutor therefore referred to facts outside the record when she claimed Ms. Rickett picked out Mr. Hale's trial clothes.

b. *No curative instruction could have erased the prejudicial effect of the cumulative misconduct, necessitating a new trial.*

Defense counsel did not object to any of the misconduct discussed above. Where defense counsel does not object, the error is typically deemed waived, "unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[4] State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). "Reviewing

[4] The constitutional harmless error standard applies to the prosecutor's improper tailoring argument, because it burdened Mr. Hale's article I, section 22 rights. See State v. Espey, 184 Wn. App. 360, 369, 336 P.3d 1178 (2014). Because this more stringent standard is necessarily met by demonstrating flagrant and ill-intentioned misconduct, the latter is the focus of Mr. Hale's argument.

courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Id. at 762.

The jury was properly instructed "the lawyers' statements are not evidence" and "[y]ou must disregard any remark, statement, or argument that is not supported by the evidence[.]" CP 51. Had defense counsel timely objected to the misconduct, the trial court likely would have reminded the jury of these instructions. But that reminder would not have been enough to cure the prejudice resulting from the prosecutor's repeated and deliberate reference to facts not in evidence.

The Washington Supreme Court has recognized there is good reason prosecutors are prohibited from referring to facts not in evidence:

> The prosecutor's argument is likely to have significant persuasive force with the jury . . . Prosecutorial conduct in argument is a matter of special concern because of the possibility that the jury will give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office but

> also because of the fact-finding facilities presumably available to the office.

In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012) (quoting AM. BAR ASS'N, Standards for Criminal Justice std. 3-5.8 (2d ed. 1980)). In other words, "'[b]ecause the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant.'" State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015) (second alteration in original) (quoting United States v. Solivan, 937 F.2d 1146, 1150 (6th Cir. 1991)).

This is precisely the danger with the prosecutor's repeated claims that Mr. Hale admitted to coming up with some ideas about his testimony. Why would the prosecutor have asked that question if she did not know it to be true? Indeed, the holding of Reeder is a fairly nuanced area of law: if the defendant denies an accusation or does not recall it, then the prosecutor's question is not in evidence. This nuance was undoubtedly lost on some

jurors, who could have been easily swayed by the prosecutor's misrepresentation of the evidence.

The repetition of the improper remarks exacerbated their harmful effect, as well. The Reeder court recognized as much, where the prosecutor repeated the misstatements of fact three times in closing. 46 Wn.2d at 891-92. Here, the prosecutor repeated the improper argument *four* times, combined with the unconstitutional tailoring claim, as well as the assertion that Ms. Rickett picked out Mr. Hale's trial clothes based on no evidentiary support at all. It is well-established "'the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.'" Glasmann, 175 Wn.2d at 707 (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)); accord State v. Loughbom, 196 Wn.2d 64, 77, 470 P.3d 499 (2020) (three improper references to the "war on drugs" necessitated reversal). Many of the improper remarks also came during the prosecutor's rebuttal argument, which further

increased their prejudicial effect. State v. Lindsay, 180 Wn.2d 423, 443, 326 P.3d 125 (2014).

Even more importantly, however, the improper remarks struck at the heart of Mr. Hale's defense: his credibility. Mr. Hale elected to testify and explained the guns and drugs must be Mr. Ufford's, because they were not his (except for a personal-use amount, which Mr. Hale conceded). RP 451-53, 460. This was plausible, given that Mr. Ufford was seen by police loading items into the Jeep. RP 187-89. Ms. Rickett corroborated Mr. Hale's defense, testifying many of the items in the Jeep, including clothes and the skateboard found with the shotgun in the trunk, did not belong to Mr. Hale. RP 341-46, 346-47. Ms. Rickett further testified Mr. Hale never threatened to kill her and she did not feel afraid for her life. RP 334, 336. Although Ms. Rickett's statements on her 911 call suggested otherwise, she explained at trial she did not recall making those statements and, if she did make them, "[m]aybe it wasn't the best words to say" and "maybe it was blown out of context." RP 333-34.

Against this backdrop, the prosecutor systematically undermined Mr. Hale's credibility with facts not in evidence, repeatedly suggesting Mr. Hale "came up with" his testimony after conspiring with his roommate and hearing all the other testimony at trial. RP 562, 607-08. The prosecutor further undermined Mr. Rickett's credibility—and, by extension, Mr. Hale's—by insinuating she was so devoted to Mr. Hale that she picked out his trial clothes. RP 552. Curative instructions may have helped but could not have wholly minimized the prejudicial effect of the pervasive misconduct that all served to undermine Mr. Hale's credibility. This Court should reverse Mr. Hale's convictions and remand for a new trial.

c. *There was no reasonable strategy for defense counsel's failure to object to the improper and prejudicial remarks.*

Even if this Court is not inclined to reverse without a timely objection by defense counsel, it should reverse under the standard applicable to ineffective assistance of counsel. See In re Pers. Restraint of Lui, 188 Wn.2d 525, 560-62, 397 P.3d 90

(2017) (failure to object to prosecutorial misconduct in closing assessed under standards for ineffective assistance); State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (same). The constitutional right of the accused to effective assistance of counsel is violated when (1) defense counsel's performance was deficient and (2) that deficiency prejudiced the accused. State v. Vazquez, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021).

Although an attorney's decisions are given deference, conduct for which there is no legitimate strategic or tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

"[T]he difficulty of proving flagrant and ill intentioned misconduct emphasizes the magnitude of defense counsel's responsibility to protect their clients' right to a fair trial and the consequences for their clients when counsel fails to act."

Loughbom, 196 Wn.2d at 74. Washington courts therefore recognize counsel has the "duty to object to a prosecutor's allegedly improper argument." Emery, 174 Wn.2d at 761. Objections are particularly important "to prevent counsel from making additional improper remarks[.]" Id. at 762.

Here, defense counsel was aware of the law because he responded to the prosecutor's misrepresentation of the evidence in his own closing argument, emphasizing Mr. Hale never admitted to "coming up with some ideas" for his testimony. RP 602. Yet defense counsel did not object or move for a mistrial when the prosecutor repeated the improper claim three more times in rebuttal, along with making an unconstitutional general tailoring claim. RP 607-08. This meant the jury heard repeated misstatements of fact right before they commenced deliberations, with no further opportunity for defense counsel to respond. Lindsay, 180 Wn.2d at 443; State v. O'Neal, No. 50796-0-II, 2021 WL 5085417, at *8 (Nov. 2, 2021) (unpublished, GR 14.1) (holding defense counsel's failure to object to be both deficient

and prejudicial, where the prosecutor's improper remarks "directly obfuscated" the defense theory and many were made in rebuttal, leaving the defense with "no opportunity to respond"). There was no legitimate strategy for allowing the jury to hear such prejudicial "facts" not in evidence right before they began deliberating on Mr. Hale's guilt.

The prejudice standard is met, for the same reason that the misconduct was flagrant and ill-intentioned. The repeated reference to facts not in evidence undermined Mr. Hale's credibility, suggesting he concocted his testimony to fit the evidence and persuaded Ms. Rickett to do the same. Where Mr. Hale's truthfulness was the cornerstone of his defense, the improper remarks mattered. A timely defense objection might have stopped the prosecutor from making further improper comments on Mr. Hale's credibility. On this additional basis, then, this Court should reverse Mr. Hale's convictions and remand for a new trial.

3. Trial court exceeded its statutory authority by imposing nine months of community custody for Mr. Hale's felony harassment conviction.

The trial court imposed nine months of community custody on Count 1, the felony harassment conviction. CP 128. However, "[t]he Sentencing Reform Act of 1981 (SRA) does not authorize a court to impose community custody for felony harassment." State v. France, 176 Wn. App. 463, 473, 308 P.3d 812 (2013). This is because felony harassment is not included as a crime against persons under RCW 9.94A.411(2). In re Post Sentence Review of Childers, 135 Wn. App. 37, 40-41, 143 P.3d 831 (2006). In these circumstances, RCW 9.94A.701(3) "unambiguously limits" the court's authority to impose community custody for offenses listed as crimes against persons, which felony harassment is not. See In re Sentences of Jones, 129 Wn. App. 626, 630, 120 P.3d 84 (2005).

Because the trial court imposed community custody without authority to do so, this Court should remand for the nine-

month community custody term to be stricken from Mr. Hale's judgment and sentence. See id. at 631.

4. **Mr. Hale's judgment and sentence erroneously includes discretionary supervision fees.**

Remand is also necessary for supervision fees to be stricken from Mr. Hale's judgment and sentence. The court at sentencing did not specifically find Mr. Hale indigent or state its intent to waive discretionary legal financial obligations (LFOs). RP 643-46. However, the judgment and sentence reflects that intent by imposing only mandatory LFOs—the $500 victim assessment and $15 domestic violence assessment. CP 129. The court also found Mr. Hale indigent for purposes of the appeal. CP 114-15.

Despite the court's waiver of all other discretionary LFOs, the judgment and sentence ordered, as a condition of Mr. Hale's community custody: "(7) pay supervision fees as determined by DOC." CP 128. Supervision fees are discretionary LFOs, waivable by the trial court. State v. Bowman, 198 Wn.2d 609,

629, 498 P.3d 478 (2021). The supreme court in Bowman held a trial court "commit[s] procedural error by imposing a discretionary fee where it had otherwise agreed to waive such fees." Id. The court ordered supervision fees to be stricken from Bowman's judgment and sentence. Id. Pursuant to Bowman, this Court should remand for the discretionary supervision fees to be stricken from Mr. Hale's judgment and sentence.

Division Three of this Court also just held the legislature's recent amendment to RCW 9.94A.703—removing supervision fees from the sentencing court's authority to impose—applies to cases still pending on appeal. State v. Wemhoff, __Wn. App. 2d__, 519 P.3d 297, 298-99 (2022); see also Laws of 2022, ch. 29, § 8. For this additional reason, the supervision fees should be stricken from Mr. Hale's judgment and sentence.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Mr. Hale's convictions and remand for a new trial. Alternatively, this Court should remand for the trial court to strike Mr. Hale's

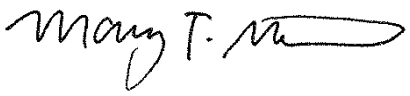
nine-month term of community custody, as well as community supervision fees.

DATED this 30th day of January, 2023.

I certify this document contains 11,876 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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Appendix

CHAPTER XV.

OF THE TRIAL OF CIVIL ACTIONS.

SEC. 204. An issue of law shall be tried by the court, unless referred as provided in this chapter. An issue of fact shall be tried by a jury, unless a jury trial be waived, or a reference be ordered, as provided in this chapter. The waiver of a jury, or agreement to refer, shall be by stipulation of the parties filed, or the oral consent of parties given in open court and entered in the records: *Provided*, That nothing herein contained shall be so construed as to restrict the chancery powers of the judges, or to authorize the trial of any issue by a jury, when the complaint alleges an equitable claim, and seeks relief solely upon the ground of the equities of the demand made by the pleadings in the action.

SEC. 205. A motion to continue a trial on the ground of the absence of evidence, shall only be made upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit the evidence which he expects to obtain; and if the adverse party admit that such evidence would be given, and that it be consided as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

SEC. 206. When the action is called for trial, the clerk shall prepare separate ballots, containing the names of the jurors summoned, who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted, before the jury is complete, or if from any cause, a juror or jurors be excused or discharged, the sheriff, under the direction of the court, shall summon from the bystanders, citizens of the county or district, as many qualified persons as may be necessary to complete the jury. Whenever it shall be requisite for the sheriff to summon more than one person at a time from the bystanders or body of the district or county, the names of the talesmen shall be returned to the clerk, who shall thereupon write the names upon separate ballots and deposit the same in the trial jury box, and draw such ballots separately therefrom, as in the case of the regular panel. The jury shall consist of twelve persons, unless the parties con-

sent to a less number. The parties may consent to any number not less than three, and such consent shall be entered by the clerk on the minutes of the trial.

SEC. 207. Either party may challenge the jurors, but when there are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges.

SEC. 208. A peremotory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

SEC. 209. A challenge for cause is an objection to a juror, and may be either:

1. General; that the juror is disqualified from serving in any action; or

2. Particular; that he is disqualified from serving in the action on trial.

SEC. 210. General causes of challenge are:

1. A conviction for a felony.

2. A want of any of the qualifications prescribed by law for a juror.

3. Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of performing the duties of a juror.

SEC. 211. Particular causes of challenge are of two kinds:

1. For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.

2. For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the trier in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias.

SEC. 212. A challenge for implied bias may be taken for any or all of the following causes, and not otherwise:

1. Consanguinity or affinity within the fourth degree to either party.

2. Standing in the relation of guardian and ward, attorney and client master and servant or landlord and tenant, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages, of the adverse party, or being surety or bail in the action called for trial, or otherwise, for the adverse party.

3. Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, or in a criminal action by the territory against either party, upon substantially the same facts or transaction.

4. Interest on the part of the juror in the event of the action, or the principal question involved therein, excepting always, the interest of the juror as a member or citizen of the county or municipal corporation.

SEC. 213. A challenge for actual bias may be taken for the cause mentioned in the second subdivsion of section two hundred and eleven. But on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the

challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

SEC. 214. An exemption from service on a jury shall not be cause of challenge, but the privilege of the person exempted.

SEC. 215. The jurors having been examined as to their qualifications, first by the plaintiff and then by the defendant, and passed for cause, the peremptory challenges shall be conducted as follows, to-wit:

The plaintiff may challenge one, and then the defendant may challenge one, and so alternately until the peremptory challenges shall be exhausted. The panel being filled and passed for cause, after said challenge shall have been made by either party, a refusal to challenge by either party in the said order of alternation, shall not defeat the adverse party of his full number of challenges, but such refusal on the part of the plaintiff to exercise his challenge in proper turn, shall conclude him as to the jurors once accepted by him, and if his right be not exhausted, his further challenges shall be confined, in his proper turn, to talesmen only.

SEC. 216. The challenges of either party shall be taken separately in the following order, including in each challenge all the causes of challenge belonging to the same class:

1. For general disqualification.
2. For implied bias.
3. For actual bias.
4. Peremptory.

SEC. 217. The challenge may be excepted to by the adverse party for insufficiency, and if so, the court shall determine the sufficiency thereof, assuming the facts alleged therein to be true. The challenge may be denied by the adverse party, and if so, the court shall try the issue and determine the law and the facts.

SEC. 218. Upon the trial of a challenge, the rules of evidence applicable to testimony offered upon the trial of an ordinary issue of fact shall govern. The juror challenged, or any other person otherwise competent may be examined as a witness by either party. If a challenge be determined to be sufficient, or found to be true, as the case may be, it shall be allowed, and the juror to whom it was taken excluded: but if determined or found otherwise, it shall be disallowed.

SEC. 219. The challenge, the exception and the denial may be made orally. The judge of the court shall note the same upon his minutes, and the substance of the testimony on either side.

SEC. 220. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them, will well, and truly try, the matter in issue between the plaintiff and defendant, and a true verdict give, according to the law and evidence as given them on the trial.

SEC. 221. When the jury has been sworn, the trial shall proceed in the following order:

1. The plaintiff must briefly state the cause of action and the evidence by which he expects to sustain it. The defendant may in like manner state the defense and the evidence he expects to offer in support thereof, but nothing in the nature of comments or argument shall be allowed in opening the case. It shall be optional with the defendant whether he

states his case before or after the close of the plaintiff's testimony.

2. The plaintiff or the party upon whom rests the burden of proof in the whole action, must first produce his evidence; the adverse party will then produce his evidence.

3. The parties will then be confined to rebutting evidence, unless the court for good reasons, in furtherance of justice, permits them to offer evidence in their original case.

4. When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; or either party may request instructions to the jury on points of law, and if the court refuse to give the same, the party requesting may except. Either party shall also be entitled to require of the judge that all interlocutory orders, instructions or rulings upon the evidence during the progress of the trial of a cause, shall be reduced to writing, together with any exceptions that may be made thereto, and the same shall be made a part of the record of the case, and any refusal on the part of the judge trying the cause or making the order to comply with all or any of the provisions of this section shall be regarded error, and entitle the party whose request shall have been refused to a reversal of the judgment on a writ of error: *Provided, always*, That the instruction or ruling so requested is pertinent and consistent with the law and evidence of the case, and that such refusal has worked an injury to the party requesting the same.

5. After the conclusion of the evidence and the filing of request for charge in writing or instructions, the plaintiff or party having the burden of proof may, by himself or one counsel, address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner by himself and one counsel, or by two counsel, and be followed by the party or counsel of the party first addressing the court. No more than two speeches on behalf of plaintiff or defendant shall be allowed.

6. The court shall then charge the jury upon the law in the case. If no request has been made for said charge to be in writing, or if no instructions have been requested, said charge may be oral; but either party at any time before the jury return their verdict, may except to the same or any part thereof; but no exception shall be regarded by the supreme court, unless the same shall embody the specific parts of said charge to which exception is taken. In charging the jury, the court shall state to them all matters of law necessary for the information of the jury in finding a verdict; and if it become necessary to allude to the evidence, it shall also inform the jury that they are the exclusive judges of all questions of fact.

SEC. 222. Any party may, when the evidence is closed, submit in distinct and concise propositions the conclusions of fact which he claims to be established, or the conclusions of law which he desires to be adjudged, or both. They may be written and handed to the court, or at the option of the court, oral, and entered in the judge's minutes.

SEC. 223. All questions of law including the admissibility of testimony, the facts preliminary to such admission, and the construction of statutes

and other writings, and other rules of evidence, are to be decided by the court, and all discussions of law addressed to it.

SEC. 224. All questions of fact other than those mentioned in the section preceding, shall be decided by the jury, and all evidence thereon addressed to them.

SEC. 225. Whenever in the opinion of the court it is proper that the jury should have a view of real property which is the subject of litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place which shall be shown to them by the judge or by a person appointed by the court for that purpose. While the jury are thus absent no person other than the judge, or person so appointed, shall speak to them on any subject connected with the trial.

SEC. 226. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case they may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

SEC. 227. If after the formation of the jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, unless the parties agree to proceed with the other jurors, a new juror may be sworn and the trial begin anew; or the jury may be discharged and a new jury then or afterwards formed.

SEC. 228. A juror may be examined by either party as a witness, if he be otherwise competent. If he be not so examined, he shall not communicate any private knowledge or information that he may have of the matter in controversy, to his fellow jurors, nor be governed by the same in giving his verdict.

SEC. 229. After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the best of his ability, keep the jury thus separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on.

SEC. 230. If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court order them to be provided with suitable and sufficient food and lodging, they shall be so provided by the sheriff, at the expense of the county.

SEC. 231. Upon retiring for deliberation, the jury may take with them the pleadings in the cause, and all papers which have been received as evidence on the trial, (except depositions,) or copies of such parts of public records or private documents given in evidence, as ought not,

in the opinion of the court, to be taken from the person having them in possession.

SEC. 232. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the case, they may require the officer having them in charge to conduct them into court. Upon their being brought into court the information required shall be given in the presence of or after notice to the parties, or their attorneys.

SEC. 233. The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

SEC. 234. In all cases where a jury are discharged or prevented from giving a verdict by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action shall be continued to the next term, unless both parties demand an immediate trial, in which case it shall go to the foot of the trial list.

SEC. 235. While the jury are absent the court may adjourn from time to time, in respect to other business, but it is nevertheless to be deemed open for every purpose connected with the cause submitted to the jury until a verdict is rendered or the jury discharged. A final adjournment of the court discharges the jury.

SEC. 236. When the jury have agreed upon their verdict they shall be conducted into court by the officer having them in charge. Their names shall then be called, and if all do not appear, the rest shall be discharged without giving a verdict.

SEC. 237. If the jury appear, they shall be asked by the court or the clerk whether they have agreed upon their verdict, and if the foreman answer in the affirmative, he shall on being required declare the same.

SEC. 238. When a verdict is given and before it is filed, the jury may be polled at the request of either party, for which purpose each shall be asked whether it is his verdict; if any juror answer in the negative the jury shall be sent out for further deliberation. If the verdict be informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may again be sent out.

SEC. 239. When the verdict is given and is such as the court may receive, and if no juror disagree or the jury be not again sent out, the clerk shall file the verdict. The verdict is then complete and the jury shall be discharged from the case. The verdict shall be in writing, and under the direction of the court shall be substantially entered in the journal as of the day's proceedings on which it was given.

CHAPTER XVI.

THE VERDICT.

SEC. 240. The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally upon all or

fendant, the court may, in its discretion, grant a change of venue to the most convenient county or district. The clerk must thereupon make a transcript of the proceedings and order of court, and having sealed up the same with the original papers, deliver them to the sheriff, who must without delay deposit them in the clerk's office of the proper county, and make his return accordingly.

SEC. 1074. No change of venue from the district shall be allowed on account of the prejudice of the inhabitants of any particular county, but where a party or his attorney shall make his affidavit, and prove to the satisfaction of the court, or judge, that the inhabitants of any particular county are so prejudiced or excited, or so particularly interested in the cause or question, that he believes the party cannot have justice done by a jury of that county, then no juror for that particular case shall be taken from that county, unless by consent of the party making the objection, but the case shall be tried by the jurors from the other counties who may be in attendance as grand and petit jurors, and if, from challenges or any other cause, there shall not remain twelve competent jurors, then the case may be tried by a number less than twelve: *Provided*, That the defendant and prosecuting attorney consent to so try the case.

SEC. 1075. The court may at its discretion at any time order a change of venue or place of trial to any county or district in the territory, upon the written consent or agreement of the prosecuting attorney and the defendant.

SEC. 1076. When a change of venue is ordered, if the offense be bailable, the court shall recognize the defendant, and, in all cases, the witnesses to appear at the term of the court to which the change of venue was granted.

CHAPTER LXXXVII.

OF TRIALS.

SEC. 1077. A continuance may be granted in any case on the ground of the absence of evidence on the motion of the defendant supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it; and also the name and place of residence of the witness or witnesses; and the substance of the evidence expected to be obtained, and if the prosecuting attorney ad-

mit that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper the continuance shall not be granted.

SEC. 1078. Issues of fact joined upon an indictment shall be tried by a jury of twelve persons, and the law relating to the drawing, retaining and selecting jurors, and trials by jury in civil cases, shall apply to criminal cases.

SEC. 1079. In prosecution for capital offenses, the defendant may challenge peremptorily twelve jurors; in prosecution for offenses punishable by imprisonment in the penitentiary, six jurors; in all other prosecutions, three jurors. When several defendants are on trial together, they must join in their challenges.

SEC. 1080. The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in all other cases, three jurors.

SEC. 1081. Challenges to the panel shall only be allowed for a material departure from the forms prescribed by law, for the drawing and return of the jury, and shall be in writing, sworn to and proved to the satisfaction of the court.

SEC. 1082. Challenges for cause shall be allowed for such cause as the court may, in its discretion, deem sufficient, having reference to the causes of challenge prescribed in civil cases, as far as they may be applicable, and to the substantial rights of the defendant.

SEC. 1083. No person whose opinions are such as to preclude him from finding any defendant guilty of an offense punishable with death, shall be compelled or allowed to serve as a juror on the trial of any indictment for such an offense.

SEC. 1084. The jury shall be sworn or affirmed to well and truly try the issue between the territory and the defendant, according to the evidence; and, in capital cases, to well and truly try, and true deliverance make between the territory and the prisoner at the bar, whom they shall have in charge, according to the evidence.

SEC. 1085. The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court, except in capital cases.

SEC. 1086. No person prosecuted for an offense punishable by death, or by confinement in the penitentary or in the county jail, shall be tried unless personally present during the trial.

SEC. 1087. No person prosecuted for an offense punishable by a fine only, shall be tried without being personally present, unless some responsible person, approved by the court, undertakes to be bail for stay of execution and payment of the fine and costs that may be assessed against the defendant. Such undertaking must be in writing, and is as effective as if entered into after judgment.

SEC. 1088. The court shall decide all questions of law which shall arise in the course of the trial. The same laws in relation to giving instructions to the jury by the court, and the argument of counsel and taking exceptions, as is now provided in the civil practice act, shall also govern in criminal cases, except as herein specially provided.

SEC. 1089. Juries in criminal cases shall not be allowed to separate, except by consent of the defendant and the prosecuting attorney, but shall be kept together, without meat or drink, unless otherwise ordered by the court, to be furnished at the expense of the county.

SEC. 1090. The court may order a view by any jury impanneled to try a criminal case.

SEC. 1091. When two or more defendants are indicted jointly, any defendant requiring it shall be tried separately.

SEC. 1092. When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the territory. A defendant may also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court, for the purpose of giving evidence for a co-defendant. The order of discharge is a bar to another prosecution for the same offense.

SEC. 1093. When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant shall not be discharged if there appear to be good cause to detain him in custody; but the court must recognize him to answer the offense shown, and if necessary, recognize the witnesses to appear and testify.

SEC. 1094. When it appears at any time before verdict or judgment, that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment to be corrected, and direct that all the papers and proceedings be certified to the proper court of the [proper] county, and recognize the defendant and witnesses to appear at such court on the first day of the next term thereof, and the prosecution shall proceed in the latter court in the same manner as if it had been there commenced.

SEC. 1095. When a jury has been empanneled in either case contemplated in the two last preceding sections, such jury may be discharged without prejudice to the prosecution.

SEC. 1096. When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

SEC. 1097. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense.

SEC. 1098. In all other cases, the defendant may be found guilty of an offense, the commission of which is necessarily included within that with which he is charged in the indictment.

SEC. 1099. On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly.

SEC. 1100. When there is a verdict of conviction in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to re-consider the verdict; and if after such re-consideration they return the same verdict, it must be entered, but it shall be good cause for new trial; but where there is a verdict of acquittal, the court cannot require the jury to re-consider it.

SEC. 1101. When any person indicted for an offense shall, on trial, be

acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge, or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged.

SEC. 1102. When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court; and if all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term.

SEC. 1103. When the defendant is found guilty, the court, and not the jury, shall fix the amount of fine and the punishment to be inflicted. The verdict of the jury may be substantially in the following form:

"We, the jury, in the case of the territory of Washington, plaintiff, against ——, defendant, find the defendant (guilty or not guilty, as the case may be.) (Signed,) A B, foreman."

SEC. 1104. When the defendant is found guilty, the court shall render judgment accordingly, and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise.

CHAPTER LXXXVIII.

OF NEW TRIALS AND ARREST OF JUDGMENT.

SEC. 1105. An application for a new trial must be made before judgment, and may be granted for the following causes:

1. When the jury has received any evidence, paper, document or book not allowed by the court, to the prejudice of the substantial rights of the defendant.

2. Misconduct of the jury.

3. For newly discovered evidence material for the defendant, which he could not have discovered with reasonable diligence and produced at the trial.

4. Accident or surprise.

5. Admission of illegal testimony and misdirection of the jury by the court, in a material matter of law, excepted to at the time.

6. When the verdict is contrary to law and evidence; but not more than two new trials shall be granted for these causes alone.

SEC. 1106. When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the preceding section, the facts on which it is based shall be set out in an affidavit.

SEC. 1107. Judgment may be arrested on the motion of the defendant for the following causes:

1. No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court.

NIELSEN, BROMAN & KOCH P.L.L.C.

January 30, 2023 - 7:34 AM

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Appellate Court Case Title:	State of Washington, Respondent v Brett M. Hale, Appellant
Superior Court Case Number:	21-1-00861-5

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